83

Office-Supreme Court
FILED
FEB 20 195
CHARLES ELMORE C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 569

JOY SILK MILLS, INC.,
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

HENRY J. FOX,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdictional statement	1
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	9
I. The Board's Order Is Not Supported By Substantial Evidence On the Record Considered As A Whole	9
II. Counsel's Prehearing Inquiries Submitted To Employees In Preparing Petitioner's Defense To Allegations Of Unfair Labor Practices Did Not Violate Section 8(a)(1) of The Act	10
A. Inquiries By Counsel Submitted To Employees Which Are Not In Fact Coercive Are Not Violations Of Section 8(a)(1) Of The Act	11
B. The Decision Of The Court Below that Counsel's Prehearing Inquiries Which Did Not Elicit Information Of Sufficient Probative Value Violated Section 8(a)(1) Of The Act Imposes An Undue Burden Upon Counsel	12
Conclusion	13

CITATIONS

Cases:

Budd, Edward G., Manufacturing Co. v. *National Labor Relations Board*, 142 F. 2d 922, 926 (3rd Cir. 1944)	12
National Labor Relations Board v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 543 (6th Cir. 1944)	11
National Labor Relations Board v. *Caroline Mills, Inc.*, 158 F. 2d 793, 794 (5th Cir. 1946)	12

Page

National Labor Relations Board v. *East Texas Motor Freight Lines*, 140 F. 2d 404, 405 (5th Cir. 1944) 11

National Labor Relations Board v. *Enid Cooperative Creamery Association*, 169 F. 2d 986, 988 (10th Cir. 1948) 12

National Labor Relations Board v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 377 (9th Cir. 1941) 11

National Labor Relations Board v. *Pittsburgh Steamship Company* No. 42 9

National Labor Relations Board v. *Trojan Powder Company*, 135 F. 2d 337, 338 (3rd Cir. 1943) 13

National Labor Relations Board v. *Virginia Electric & Power Company*, 314 U. S. 469, 479 (1941) 12

Sax v. *National Labor Relations Board*, 171 F. 2d 769, 772 (7th Cir. 1948) 11

Universal Camera Corporation v. *National Labor Relations Board*, No. 40 9

Statute:

National Labor Relations Act, as amended by the Labor Management Relations Act, 1947 (61 Stat. 136) 29 U.S.C., 151 et seq.:

Section 2 (6) 3
Section 2 (7) 3
Section 7 3
Section 8(a)(1) 3, 6, 7, 10
Section 8(a)(5) 3
Section 10(c) 2
Section 10(e) 3

Miscellaneous:

Canon 39 of the Canons of Ethics of the American Bar Association 12

House Conference Report, No. 510, on H.R. 3020, pp. 53-55 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 569

JOY SILK MILLS, INC.,

Petitioner

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Joy Silk Mills, Inc. prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on December 15, 1950.

Opinions Below

The Decision and Order of the National Labor Relations Board (R. 9) are reported in 85 N. L. R. B. 1263. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 168) is reported in 185 F. 2d 732 (D. C. Cir. 1950).

Jurisdiction

The decree of the United States Court of Appeals for the District of Columbia Circuit was entered on December 15, 1950 (R. 186). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1), and under Section 10(e) of the National Labor Relations Act, as amended.

Questions Presented

1. Whether the 1947 amendments to the National Labor Relations Act have enlarged the scope of judicial review of orders issued by the National Labor Relations Board.
2. Whether the order of the National Labor Relations Board is supported by substantial evidence on the record considered as a whole.
3. Whether inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices were *per se* coercive.
4. Whether inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices violated Section 8(a)(1) of the National Labor Relations Act merely because the answers were not of "sufficient probative value."

Statute Involved

The National Labor Relations Act, Act of July 5, 1935, c. 372, Section 1, 49 Stat. 449, 29 U. S. C. Section 151 *et seq.* as amended by the Labor Management Relations Act, Act of June 23, 1947, c. 120, Title I, Section 101, 61 Stat. 136, 29 U. S. C. Section 151 *et seq.* The pertinent provisions of the National Labor Relations Act, hereinafter called the Act, follow:

Section 10(c) provides in part:

> * * *. If upon the preponderance of testimony taken the Board shall not be of the opinion that the

person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *.

Section 10(e) provides in part:

* * *. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *.

Section 8(a)(1) provides:

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

Section 8(a)(5) provides:

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Statement

Petitioner is a South Carolina corporation with its principal office and place of business at Hartsville, South Carolina. It is engaged in the business of twisting, throwing and other processing of its customers' yarns and thread upon a commission basis (R. 153). The union involved herein is the United Textile Workers of America, affiliated with the American Federation of Labor, hereafter called the Union (R. 153).

On February 24, 1949, the General Counsel of the National Labor Relations Board issued a complaint against Petitioner alleging that it had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 2(6), 2(7), 7, 8(a)(1) and 8(a)(5) of the Act (R. 4).

Pursuant to notice a hearing was held in Hartsville, South Carolina on March 22 through March 25, 1949. On

May 27, 1949, the Trial Examiner issued his Intermediate Report and Recommended Order. Thereafter, Petitioner filed exceptions thereto and a brief in support thereof with the National Labor Relations Board, hereinafter called the Board. On September 13, 1949, the Board issued its Decision and Order requiring Petitioner to cease and desist from certain activities and to take certain affirmative action (R. 9).

On October 28, 1949, Petitioner filed a petition for review of, and to set aside, the Decision and Order of the Board, in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, one judge dissenting, affirmed the Board's decision, but modified the order (R. 71).

The Board's decision, which was affirmed by the court below, was based upon the facts which are hereinafter summarized.

In the summer of 1948 Petitioner employed a new plant superintendent in an effort to improve the quality and efficiency of its employees' work. As a result the employees were concerned because they believed that he would replace Zim Byrd, a popular foreman. This concern resulted in spontaneous concerted activity among the employees on the morning of September 15, 1948, when a group of employees requested S. C. Gilbert, Petitioner's president, to reassure them concerning Byrd's status. When Gilbert declined to accede to their request, a substantial number of employees signed union authorization cards later that evening and the following morning (R. 154). Thereafter, the employees with few exceptions, failed to report for work until September 20, 1948 (R. 155). During the walkout Petitioner's officials had two conferences with leaders of the walkout. These discussions primarily concerned the employees' demands with respect to Zim Byrd, and also with respect

to paid vacations (R. 154). At no time during the foregoing conferences were any references made to the Union or to union activity, nor was Petitioner aware that a majority of its employees had signed union authorization cards (R. 23).

On September 24, 1948, Gilbert received a long-distance telephone call from Joseph Jacobs, a union official. At the hearing, there was a sharp conflict in testimony as to whether Jacobs informed Gilbert during that conversation that the Union represented a majority of Petitioner's employees and whether Jacobs requested Petitioner to bargain collectively (R. 156). Later that day, a Field Examiner of the Board advised Gilbert by telephone that the Union had filed a representation petition with the Board. He asked Gilbert if he would agree to a consent election. Gilbert informed the Field Examiner that he wished to consult his attorney before arriving at a decision (R. 25).

Less than one week later, September 30, 1948, a meeting of representatives of the Petitioner, the Union and the Board was held at Petitioner's plant for the purpose of arranging a consent election. The meeting was conducted in an atmosphere of complete cooperation, as evidenced by an official account of the proceedings of the Board's Field Examiner who attended the meeting (R. 83). Tentative arrangements for a consent election to be held on October 19, 1948 were completed at this conference (R. 155).

On October 7, 1948, Petitioner posted a declaration of policy on the employees' bulletin board advising the employees of their right to vote either for or against the Union without regard to Petitioner's views on the subject. On October 12 and October 18, 1948, Petitioner read prepared statements to the employees, advising them among other things of their rights under the Act and their freedom to exercise those rights regardless of Petitioner's views. On

October 19, 1948, the election was held as scheduled and the Union was defeated by a substantial majority.

At the hearing, there were numerous sharp differences between testimony of Petitioner's witnesses and those of the Board's General Counsel with respect to alleged statements and actions of Petitioner's plant superintendent and bookkeeper which occurred on October 19, 1948, the day of the election and the preceding day (R. 43, 47). Both the Trial Examiner and the Board resolved most of these conflicts against Petitioner's witnesses and found that the plant superintendent and bookkeeper, engaged in conduct which violated Section 8 (a)(1) of the Act (R. 53).

With respect to Petitioner's conduct up until October 7, 1948, the Trial Examiner made an affirmative finding that Petitioner did not engage in any acts which constituted interference, restraint or coercion or indeed, was even concerned about the outcome of the election (R. 34). However, the Trial Examiner found that "sometime between October 7 and October 12", Petitioner's attitude of impartiality and unconcern underwent a reversal, and that "notwithstanding its initial *bona fides* respondent could no longer be heard to say it entertained an honest doubt as to the union's representative status * * *" (R. 55). He thereupon concluded that the acts of Petitioner on October 12, 18 and 19, 1948, which he found to be violations of Section 8(a)(1) of the Act also constituted a refusal to bargain collectively with the Union in violation of Section 8(a)(5) of the Act (R. 55). The Board reversed the Trial Examiner's findings as to Petitioner's initial *bona fides* and held that there was an unlawful refusal to bargain on September 24, 1948, during the course of Jacobs' first telephone conversation with Gilbert (R. 12).

The facts upon which the Board found that the inquiries on a questionnaire submitted to employees by counsel in

preparing Petitioner's defense to the alleged unfair labor practices violated Section 8(a)(1) of the Act were stipulated as follows (R. 164-166):

> Counsel for the Petitioner, on or about March 10 and 11, 1949, submitted a questionnaire to a substantial number of Petitioner's employees employed during the months of September and October, 1948. Counsel prepared the questionnaire in the course of preparation and investigation of the facts alleged in the complaint. Before preparing the questionnaire, Petitioner's counsel called the Board's Regional Director in Atlanta by telephone and informally requested the Chief Law Officer of the Region for a more definite statement of the facts in order to prepare Petitioner's defense in the hearing. This request was refused whereupon Petitioner's counsel filed a motion for a more definite statement on the same basis and also filed its answer. The motion was referred to the Trial Examiner and was granted in part but the requested information was not furnished Petitioner under the Trial Examiner's order until the morning of March 22, 1949, at the start of the hearing.
>
> The questionnaire was submitted to and answered by the employees of the Petitioner under the following circumstances.
>
> They were interviewed in the canteen in groups of from four to eight employees on company time. Counsel introduced themselves by name to the employees and advised them that they represented the company as attorneys. They told the employees that the purpose of the questionnaire which was to be given them was to enable counsel to prepare the company's defense in the hearing that was to take place on March 22. The employees were advised that the filling out of the questionnaire was completely voluntary and that there would be no reward, no promises, threats or coercion of any kind connected with the filling out of the questionnaire. They were advised that they were free to leave the canteen at that point even before the

questionnaires were handed to them. They were advised that they could omit the answer to any question if they didn't understand it thoroughly.

They were requested to ask counsel concerning the meaning of any words, phrases, or statements which were contained in the questionnaire that they did not understand. They were requested to answer each question truthfully if they answered it and to state the facts whether they thought them unfavorable to the company or not. They were requested not to compare answers to the questionnaire among themselves, to give independent answers in accordance with the facts as each understood them to be. They were requested not to answer questions by conjecture and to state only facts of which they were certain.

They were advised that they had a right to engage in union activities prior to the election, and for that matter at the present or any time in the future. They were also told that the company had no right to interfere with their union activities in any manner.

At that point the employees were asked whether all the foregoing statements were clear to each of them and whether any of them had any questions to ask concerning their rights in connection with the filling out of the questionnaire. Counsel then read each question aloud and asked each employee if the question was clear to him. Thereupon, each employee filled out his questionnaire independently and without assistance of counsel.

* * * * * *

Specification of Errors to Be Urged

The court below erred:

1. In failing to apply the standard of review required by the National Labor Relations Act, as amended by the Labor Management Relations Act, 1947.

2. In holding that the Board's order was supported by substantial evidence on the record considered as a whole.

3. In holding that all inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegation of unfair labor practices were coercive, *per se.*

4. In holding that certain inquiries submitted to employees by counsel in preparation of Petitioner's defense to allegations of unfair labor practices violated Section 8(a)(1) of the Act merely because the answers were not of sufficient probative value.

Reasons for Granting the Writ

I. *The Board's Order Is Not Supported By Substantial Evidence On The Record Considered As A Whole.*

In deciding that the Board's order was supported by substantial evidence on the record considered as a whole, the court below indicated that it applied the same standard of review which existed prior to 1947 when the Act was amended.[1] It stated that it was not permitted "to weigh evidence or to substitute its judgment for the Board's as to what conclusions are to be drawn from the evidence."

Petitioner submits that if the court below had assumed its full measure of responsibility in reviewing the Board's decision, as required by the present amended Act, it would have reversed that decision which was based upon tenuous inferences and presumptions.

Since the identical question involving the scope of judicial review has been presented in *Universal Camera Corporation* v. *National Labor Relations Board,* No. 40, and *National Labor Relations Board* v. *Pittsburgh Steamship Company,* No. 42, presently pending in this Court, it is apparent that this Court's decision in those cases will govern this issue in the instant case.

---

[1] 29 U.S.C. Sections 160(c) and 160(e).

II. *Counsel's Prehearing Inquiries Submitted To Employees In Preparing Petitioner's Defense To Allegations Of Unfair Labor Practices Did Not Violate Section 8(a)(1) Of The Act.*

The decision of the court below, that the prehearing inquiries of Petitioner's counsel violated Section 8(a)(1) of the Act presents a novel issue of law which involves the administrative and judicial application of an important federal statute. In the course of preparing Petitioner's defense to the Board's complaint, counsel for Petitioner submitted a questionnaire to the employees under circumstances described above in this brief, *supra*, p. 7. The court below affirmed the Board's decision that twenty of the questions on the questionnaire (R. 58) did not violate Section 8(a)(1) of the Act because the information elicited was of sufficient probative value. However, it held that submission of the following eight inquiries on the questionnaire violated Section 8(a)(1) of the Act (R. 15):

> 7. What did you consider to be the purpose of signing the card?
>
> 8. Did you consider yourself a member of the Union when you signed the card?
>
> 9. At the time you signed the card, did you pay any money for membership or other fees in the Union?
>
> 10. Did you agree to the future payment of any membership, initiation or other fees to the Union?
>
> 13. Did you terminate your connection with the Union at any time after you signed a card?
>
> 14. If so, for what reason did you terminate your connection with the Union?
>
> 21. Did you cast your vote at the election solely according to your own personal views concerning whether you desired the Union to represent you and without any fear or threats as to your job and future with the Company, and without being influenced in any respect by promise of future benefits by the Company?

25. Did you consider that these speeches or the statements and notices posted on the bulletin board were threats or promises of benefits to influence your vote against the Union?

A. *Inquiries By Counsel Submitted To Employees Which Are Not In Fact Coercive Are Not Violations Of Section 8(a)(1) Of The Act.*

The court's basic premise that all inquiries by Petitioner's counsel are *per se* coercive is without basis in law or fact. The Board made no effort to prove, nor is there any evidence to support the court's conclusion that the eight inquiries were in fact coercive. Indeed, it is clear that the court's conclusion is based solely upon the Board's expertise as reflected in Board decisions cited in the opinion of the court below (R. 177). Such reliance upon the Board's expert knowledge in contradistinction to actual proof of coercion, contravenes the intent of Congress as clearly expressed in the legislative history of the Act.[2]

In *National Labor Relations Board* v. *Grower-Shipper Vegetable Association*, 122 F. 2d 368, 377 (9th Cir. 1941) the court pointed out that interference, restraint and coercion are the results of acts, *not* acts themselves. Since there is no evidence that the eight inquiries in question resulted in coercion or other interference or restraint, they do not violate the Act. In *Sax* v. *National Labor Relations Board*, 171 F. 2d 769, 772 (7th Cir. 1948),[3] the court stated that ". . . queries, standing alone as they do in this case, are insufficient to support a finding of a violation of Section 8(1). They come instead within the protection

[2] The Board may not substitute its so-called "expertness" for facts in the record in meeting the substantial evidence standard. House Conference Report No. 510, on H.R. 3020, pp. 53-55.

[3] See also *National Labor Relations Board* v. *Brown-Brockmeyer Co.*, 143 F. 2d 537, 543 (6th Cir. 1944) and *National Labor Relations Board* v. *East Texas Motor Freight Lines*, 140 F. 2d 404, 405 (5th Cir. 1944).

of free speech protected by the First Amendment to the Federal Constitution." *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469, 479 (1941).[4] It is apparent that the court below wholly disregarded the principles established in the foregoing decisions by its assumption that all inquiries are *per se* coercive.

B. *The Decision Of The Court Below That Counsel's Prehearing Inquiries Which Did Not Elicit Information Of Sufficient Probative Value Violated Section 8(a)(1) Of The Act Imposes An Undue Burden Upon Counsel.*

In spite of the court's premise that all inquiries are *per se* coercive, it affirmed the Board's decision that twenty of the inquiries on the questionnaire (R. 178) did not violate Section 8(a)(1) of the Act, on the ground that they were both relevant to the allegations of the complaint and also of sufficient probative value. The volatile standard adopted by the court imposed an unprecedented and unwarranted burden upon counsel in preparing Petitioner's defense to the allegations of the complaint.

Counsel's obligation to prepare a case thoroughly requires extensive investigation and interviews of witnesses, not only to ascertain all material facts bearing on the issues, but also facts relating to issues of credibility, bias, and interest of both its own and opposing witnesses.[5] This is particularly true in unfair labor practice cases since background material, not part of the issues in a complaint,

---

[4] See also *National Labor Relations Board* v. *Enid Cooperative Creamery Association*, 169 F. 2d 986, 988 (10th Cir. 1948); *National Labor Relations Board* v. *Caroline Mills, Inc.*, 158 F. 2d 793, 794 (5th Cir. 1946); *Edward G. Budd Manufacturing Co.* v. *National Labor Relations Board*, 142 F. 2d 922, 926 (3rd Cir. 1944).

[5] The propriety of interviewing witnesses or prospective witnesses for the opposing side under the circumstances present in this case is clearly sustained by Canon 39 of the Canons of Ethics of the American Bar Association.

has always been regarded as significant by the Board and the courts. Cf. *National Labor Relations Board* v. *Trojan Powder Company,* 135 F. 2d 337, 338 (3rd Cir. 1943). In the instant case, where the allegations of the complaint were so broad (R. 4) that it may be characterized as a "shotgun" complaint, it was impossible to determine prospectively which questions would elicit answers of high probative value. Since it is apparent that the degree of probativeness of the answer to a particular question can be ascertained only in retrospect, the standard applied by the court is so illogical that it deprived Petitioner of its right to prepare an adequate defense to the allegations of the complaint.

Conclusion

For all of the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

HENRY J. FOX,
Attorney for Petitioner.

POSNER, BERGE, FOX & ARENT,
1002 Ring Building
Washington 6, D. C.

February 20, 1951.

(3158)